> is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the low tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order wages new and important problems or issues of law of first impression . . . . Although all five factors may not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Id. at 585-86 (citations omitted) (emphasis added). Prohibition is a drastic remedy which must be reserved for extraordinary cases. *State ex rel. Davidson v. Hoke*, 532 S.E.2d 50 (W.Va. 2000).

As the aforementioned authorities make clear, the writ of prohibition could have only been granted based upon a finding that the trial court exceeded all possible bounds of its power and authority in ordering the Respondent to arbitrate her employment dispute with Petitioners. In flagrant disregard for the FAA, the West Virginia Supreme Court of Appeals came to that very conclusion, banning enforcement of the trial court's Order to stay the case in favor of arbitration. (App. A, *infra*, 1a-21a). In deciding to grant the writ, the West Virginia Supreme Court of Appeals held the underlying arbitration agreement was not a valid contract under West Virginia common law due to Respondent's lack of bargaining power and limited education as well as a failure of consideration. (App. A., *infra*, 15a - 16a, 17a-21a).

The Petitioners are substantially aggrieved in that the West Virginia Supreme Court of Appeals applied state contract law in such a manner as to circumvent compliance with the FAA and the federal common law of arbitration promulgated

thereunder. Specifically, the court below singled out the agreement for suspect status by subjecting it to higher scrutiny than other contracts. The appellate court also created two distinct standards for analyzing arbitration agreements: a lower level of scrutiny where the individual signing an arbitration agreement is of higher education and means and stricter scrutiny for those individuals of lesser means and education. The FAA and federal case law promulgated thereunder prohibits this disparate treatment of arbitration agreements.

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for a writ of certiorari should be granted because the West Virginia Supreme Court of Appeals' decision squarely conflicts with both the FAA and precedent from this Court. The lower court applied state contract law in a discriminatory manner to find no valid agreement to arbitrate existed in the first place in order to avoid altogether the application of the FAA.

May a State Court of Last Resort Subject Standardized Form Arbitration Agreements to Excessive Scrutiny in a Search for Grounds Upon Which to Declare Such Agreements Unenforceable Under State Contract Law Without Thereby Demonstrating the Very Judicial Hostility to Arbitration Agreements that the Federal Arbitration Act was Enacted to Prevent?

Enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts", *Gilmer* at 24, the FAA evinces the "liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Act's

underlying policy is to guarantee the enforcement of private contractual arrangements. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Moreover, because Congress' preeminent purpose was to enforce private agreements, the Act requires courts to rigorously enforce agreements to arbitrate. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

The Act creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. *See Moses H. Cone Mem. Hosp.*, 460 U.S. at 26 n.32. This substantive federal law of arbitrability applies to any arbitration agreement within the FAA's coverage. *See id.* at 24; *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995) (recognizing "that the Act set forth substantive law"); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (enforcing Section 2 of the FAA which "provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the [FAA]"); *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984) ("While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction . . .").

The substantive federal law of arbitration is a rare example of the type of situation in which this Court has held that federal common law should be adopted. These unusual circumstances "fall into essentially two categories: Those in which a federal rule of decision is 'necessary to protect uniquely federal interests;' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (internal citations omitted).

Once the decision is made that federal common law is applicable, the choice is often whether or not to displace the law of the forum state. 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4514 at 458-59 (2d ed. 1996). As Justice Scalia put it, "it might be simpler to conceptualize the issue as simply whether to apply a federal rule, which preempts rather than adopts the parallel state law, or to apply the law of the forum state." *Id.* at 459 (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994)). The applicable common law here, subject to exceptions outlined below, is that under the FAA, arbitration contracts are analyzed under the forum state's law if that law arose to govern issues concerning the validity, revocability, and enforcement of contracts generally. *See Perry*, 482 U.S. at 492 .

Because the Act establishes a "broad principle of enforceability," *Southland Corp.*, 465 U.S. at 11, a paramount principle under the common law of arbitration is that, in interpreting arbitration contracts, as a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25. This principle has also been referred to as the presumption of arbitrability under the FAA. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 77 n.1 (1998) (In discussing the presumption of arbitrability under the NLRA, this Court "also discerned a presumption of arbitrability under the FAA."). "Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract.' the Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by

skewing the otherwise hospitable inquiry into arbitrability.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal citations omitted).

While it is well-established that courts should consult state contract law principals to determine if a valid agreement to arbitrate exists in the first instance, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1975), it is equally accepted that the liberal federal policy favoring arbitration must be taken into account even when conducting the state contract law analysis. *See Moses H. Cone*, 460 U.S. at 24-25. The FAA trumps state law, whether judicial or statutory in nature, which singles out arbitration agreements for disparate treatment.

The FAA also preempts state law of general applicability to the extent it is applied in a discriminatory fashion. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court held that a district court may only consider the validity of the arbitration clause itself and may not entertain an attack on the enforceability of the underlying contract. *See id.* at 403-04. In so holding, the Court recognized that the ultimate question before it was whether "Congress may prescribe how federal courts conduct themselves with respect to the subject over which Congress plainly has power to legislate. The answer to that can only be in the affirmative." *See id.* at 405. The Court expressly rejected any argument that it was overstepping its bounds by refusing to allow courts to analyze the validity of the contract as a whole from a state contract law standpoint. *See id.* at 405-06. In essence, the Court held that the FAA gives federal courts the right to fashion substantive federal law of arbitration to determine the validity and scope of an arbitration agreement. *See id.* at 422 (Stewart, J., dissenting).

As this Court later recognized in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989), "[S]tate law may nonetheless be preempted to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 489 U.S. at 477 (citation omitted). Given that the main thrust of the FAA is to "ensure that private agreements to arbitrate are enforced according to their own terms," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995), state law cannot be utilized to completely avoid the FAA. In his dissent in *Greentree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the Chief Justice opined that the FAA preempts not only that state law applicable exclusively to arbitration, but generally-applicable state law to the extent necessary to enforce the parties' intention to arbitrate:

> But 'state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' The parties do not dispute that this contract falls within the coverage of the FAA. The 'central purpose' of the FAA is 'to ensure that private agreements to arbitrate are enforced according to their terms.' In other words, Congress sought simply to 'place such agreements upon the same footing as other contracts.' This aim 'requires that we rigorously enforce agreements to arbitrate,' in order to 'give effect to the contractual rights and expectations of the parties.'

Bazzle, 539 U.S. at 457-58. (Rehnquist, C.J., dissenting) (citations omitted).

The foregoing principles are critical to establishing a uniform substantive law relating to the enforcement of arbitration agreements throughout the United States. Without it, employers and other entities utilizing arbitration agreements on a multi-state basis are faced with a patchwork of inconsistent decisions concerning the enforceability of their arbitration programs. Enforceability of an arbitration program should not depend on what State in which a claimant resides.

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court re-affirmed the principle first enunciated in *Gilmer* that the advantages of the arbitration process do not disappear when applied in the employment context and then recognized the inconsistency in allowing a national arbitration program's viability to depend upon the jurisdiction in which a case happened to arise:

> The considerable complexity and uncertainty that the construction of Section 1 urged by respondent [to the effect that the FAA does not apply in the majority of employment contexts] would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's pre-arbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'

532 U.S. at 123 (citing *Allied-Bruce*, 513 U.S. at 275). In deciding *Southland Corp.*, this Court concluded that the FAA trumps any state law hostile to arbitration because Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in

similar cases. *Allied-Bruce*, 513 U.S. at 271-72; *Southland Corp.*, 465 U.S. at 16. Both *Circuit City* and *Allied-Bruce* stand for the proposition that states should not be allowed to indirectly accomplish that which cannot be done directly.

The West Virginia Supreme Court of Appeals' tortured application of black letter contract law principles to avoid the enforcement of a form agreement to arbitrate is contrary to the policy considerations which led to enactment of the FAA as well as the clear Congressional mandate contained in section 2 of the FAA. If allowed to stand, this ruling will create a great deal of uncertainty for any company using an arbitration agreement on a national basis. Those courts which adopt a paternalistic view in shielding individuals from their obligation under freely executed contracts will run rough shod over the FAA by their disparate scrutiny of arbitration agreements to find some defect in contract formation by reserving for them excessive inordinate scrutiny just like the West Virginia Supreme Court of Appeals did here.

In stark contrast to the ruling under scrutiny, both the Seventh and Eighth Circuits have recognized that the FAA likely trumps even facially neutral state contract law if applied in a discriminatory fashion to defeat arbitration agreements. *See Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 367 (7th Cir. 1999) (holding that even if Illinois law would regard the arbitration provision under scrutiny as unconscionable, the FAA would nevertheless preempt such a law), *cert. denied*, 528 U.S. 811; *Webb v. R. Rowland & Co.*, 800 F.2d 803, 806-07 (8th Cir. 1986) (implying that the FAA preempts state law in determining whether an arbitration agreement was invalid as a contract of adhesion).

The Seventh Circuit applied the proper analysis in *Oblix, Inc. v. Winiecki*, 374 F.3d 488 (7th Cir. 2004), where the

employee attempted to avoid an arbitration clause in her employment contract on the grounds that it was an unconscionable contract of adhesion presented on a take it or leave it basis. *See* 374 F.3d at 490. The Seventh Circuit reversed the trial court's refusal to enforce arbitration, finding that the arguments adopted by the district court to enforce arbitration were no different than similar arguments rejected all the time to defeat arbitration in other contexts. *See id.* at 491-92. In so holding, the court recognized that standard form agreements are a fact of life and must be either uniformly enforced or invalidated whether they be found in an employment contract or a lease. *See id.* Judge Easterbrook reasoned that even generally applicable and facially neutral state contract law is pre-empted by Section 2 of the FAA if it is applied in a discriminatory manner to defeat arbitration agreements: "If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is pre-empted by Section 2 of the FAA." *Id.* at 492 (citing *Southland Corp.*, 465 U.S. at 1; *Allied-Bruce*, 513 U.S. at 271-72.)

Even though the West Virginia Supreme Court of Appeals purportedly relied on state contract law principles (instead of the liberal federal policy governing arbitration established by the FAA), the court nevertheless ignored equally applicable contract law principles which would have saved the agreement under scrutiny. Moreover, the court applied an inconsistent double standard in order to excuse what it believed to be an unsophisticated individual from a voluntarily executed contract.

A. In Violation of the FAA, the West Virginia Supreme Court of Appeals Formulated an Inconsistent Double Standard to Paternalistically Excuse What It Believed to be an Individual of Limited Sophistication from a Voluntarily Executed Agreement to Arbitrate

The West Virginia Court of Appeals found that the arbitration agreement was an unenforceable contract of adhesion given the inadequacy of bargaining power held by Respondent *vis a vis* Ryan's, particularly when coupled with her limited education and understanding of the law. (App. A, *infra*, 14a - 16a).[2] Notably, the court never analyzed whether the Respondent understood the agreement and its

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[2] The Fourth Circuit in *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) applied West Virginia law to reject a similar argument that a promise to arbitrate could never be validly made by a low income individual forced to accept such an agreement in exchange for employment. The court stated, "A ruling of unconscionability based on this analysis alone could potentially apply to every contract of employment in our contemporary economy." *Id.* at 501. The court additionally recognized that gross inadequacy in bargaining power is not enough to sustain a finding of unconscionability under West Virginia law. A party seeking to oppose a contract on grounds that it is unconscionable is additionally required to demonstrate an agreement is unfair under West Virginia law. *Id.* at 502. ("A litigant who complained that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability." (citations omitted)). Notably, the West Virginia Supreme Court of Appeals made absolutely no finding as to the reasonableness of the terms of the EDSI agreement. It improperly ended its analysis of unconscionability by focusing solely on the Respondent's limited education and bargaining power.

ramifications; it simply presumed that she could not have understood it given her limited background and education.

Contrast the holding below with the same court's prior ruling in *State ex. rel. Wells v. Matish*, 600 S.E.2d 583 (W.Va. 2004). In that case, the court held a television anchorman to his promise to arbitrate contained in an employment contract. *Id.* at 589. In enforcing the arbitration clause, the court found significant the fact that he was a sophisticated individual of higher education and given the opportunity to bargain some of the terms of the employment contract. Further evidence of the inconsistent treatment afforded arbitration contracts under West Virginia law can be found in *State ex. rel. Dunlap v. Burger*, 567 S.E.2d 265 (W.Va. 2002), *cert. denied*, 537 U.S. 1087. In that case, the West Virginia Supreme Court of Appeals struck down a jeweler's pre-printed financing contract containing an arbitration clause on the grounds that it was unconscionable because it prohibited punitive damages and class relief. In so holding, the court noted, albeit in dicta, "the pre-printed parts of the documents would probably be seen by the average person as legal gobbeldygook." *Burger*, 567 S.E.2d at 269-70 n.2.

Under the flawed analysis employed by the West Virginia Supreme Court of Appeals, no contract would ever be enforceable if presented by a large corporation to an individual of limited education and means. The form agreement used by the termite company in *Allied-Bruce*, would never have survived scrutiny under this standard. Nor would the arbitration clause approved in *Gilmer*. *See Gilmer*, 500 U.S. at 32-33 (holding that any inequality of bargaining power does not render an arbitration agreement invalid.) If the court's reasoning were applied outside the arbitration context, individuals with limited education and means could

never enter into any enforceable contract, much less a contract to arbitrate. The FAA flatly prohibits this discriminatory dual standard.

Moreover, from a policy standpoint, the reasoning employed by the lower court could easily backfire. Instead of expanding protection for employees, the Court's holding could very well result in employers being wary of hiring such individuals with limited sophistication. Ironically, the West Virginia Supreme Court of Appeals' ruling, if allowed to stand, could have a detrimental effect on the very individuals the court went to such great lengths to protect.

B. The Court Below Blatantly Disregarded the FAA by Subjecting the Agreement to Extraordinary Scrutiny in a Search for Grounds Upon Which to Declare It Unenforceable for Lack of Consideration.

The lower court also found the agreement lacking in consideration, rejecting any notion that Ryan's consideration of a potential employee's application was sufficient for consideration purposes. Although the court below recognized that under the standard enunciated in the Restatement (Second) of Contracts § 71(4), Ryan's could have provided the requisite consideration, (App. A., *infra*, 18a-19a), it nevertheless declared that Ryan's did not provide enough consideration.[3] (App. A., *infra*, 18a-20a). This conclusion

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[3] Alternatively, the court found the agreement lacking in consideration because it states Ryan's "has entered into an agreement with [EDSI] to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company under EDSI's program." (App. A., infra, 2a - 3a). The court found this statement to be a

completely ignores those West Virginia cases adopting the well-recognized contract law principle that it is not proper for a court to scrutinize the quantum of consideration as long as it is present in some form. *See Ravencliff Dev. Co. v. Lafferty*, 138 S.E. 104, 106 (W.Va. 1927) ("Little is required in the way of consideration to make a contract valid and enforceable. 'If the promissee at the instance of the promissor and moved by his promise, do any act which occasions him even the slightest trouble or inconvenience, or in doing which he incurs a risk, the act so performed constitutes a valuable consideration for the promise.'" (citations omitted)); *McCary v. Monongahela Valley Traction Co.*, 125 S.E. 92, 93 (W.Va. 1924) ("If the parties were competent to contract, mere inadequacy of consideration would not render their contract void. A valuable consideration, however small and nominal, if given or stipulated for in good faith, in the absence of fraud, is sufficient to sustain a contract.").

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misrepresentation of fact, borrowing from an unsupported finding of the Sixth Circuit United States Court of Appeals in *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 380 (6th Cir. 2005). (App. A., infra, 18a). The Sixth Circuit's finding was predicated upon the underlying contract between Ryan's and EDSI. That document was part of the record available to the West Virginia Court of Appeals. Instead of analyzing the EDSI/Ryan's contract for itself, the court simply borrowed from the Walker decision. (App. A., infra, 18a). Had the West Virginia Court of Appeals adequately considered that document for itself, it should have discovered that the statement concerning the scope of arbitration services to be provided by EDSI is accurate. The underlying contract between Ryan's and EDSI plainly provides for EDSI to provide arbitration services for all employment-related disputes between Ryan's and its employees. Accordingly, this finding of misrepresentation was erroneous from a factual standpoint.

Despite purportedly basing its holding on state contract law, the lower court failed to apply the aforementioned principle of contract law which would have saved the agreement. The FAA required the court below to construe the agreement in such a manner so as to find it enforceable. *Moses H. Cone*, 460 U.S. at 24-25. ("[A]ny doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of laches, delay or a like defense to arbitrability.") (emphasis added). The ruling below demonstrates further the extraordinary lengths the lower court went to find defects in contract formation in order to reach the desired result of relieving Respondent from her promise to arbitrate. Furthermore, the opinion is in contravention of equally well-established West Virginia law recognizing that all individuals are presumed to know the contents of every contract they sign and proceed at their own peril if they fail to do so. *See, e.g. Reddy v. Community Health Foundation of Mann*, 298 S.E.2d 906 (W.Va. 1982).

Ryan's respectfully submits that the instant case presents this Court with the opportunity to address the last real unresolved issue concerning employment arbitration and the FAA: To what extent may a court subject an arbitration agreement to extraordinary scrutiny in a search for grounds upon which to decline to enforce such form agreements, without thereby engaging in the very judicial hostility to arbitration agreements that the FAA was enacted to prevent?

C. The Lower Court Erred by Looking Beyond the Four Corners of the Arbitration Agreement when Passing on its Validity.

In addition, the West Virginia Supreme Court of Appeals went beyond the four corners of Respondent's arbitration agreement in scrutinizing the agreement under State contract law. Not only was this approach contrary to the FAA as argued above, it further highlights the current split of authority as to the proper manner in which to scrutinize arbitration agreements when making the state contract law analysis.

In *Hill v. PeopleSoft U.S.A., Inc.*, 412 F.3d 540 (4th Cir. 2005) (applying Maryland law), the Fourth Circuit properly applied the principles of the FAA and held that a Maryland district court committed reversible error when it looked beyond the four corners of an employee's arbitration contract by analyzing the employer's separate internal dispute resolution program. *Id.* at 543-44. While the holding in *Hill* arguably rests upon Maryland law, the analysis employed by the Fourth Circuit nevertheless demonstrates that particular court's unwillingness to single out arbitration agreements for suspect status like the West Virginia Supreme Court of Appeals did below. Federal law mandates that courts are not to look beyond the contract itself in scrutinizing an arbitration agreement under state contract law. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (recognizing "[a]bsent some ambiguity in the agreement, however, it is the language of the contract that defines the scope of dispute subject to arbitration . . ."). As noted above, the FAA requires that if an arbitration contract is subject to two interpretations, a court is duty bound to enforce the agreement by employing a construction in favor of arbitration. *Moses H. Cone*, 460 U.S. at 24-25.

Even assuming for sake of argument only that the West Virginia Supreme Court of Appeals' contract analysis would have been appropriate in other contexts, it was absolutely misapplied in the arbitration context. For example, in *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274-75 (4th Cir. 1997), an employee sought to avoid an arbitration agreement by asking the court to stretch contract law to its limits. The Fourth Circuit declined that invitation, determining that it was possible to construe the agreement in such a way as to find that adequate consideration did in fact exist in the form of the employer's reciprocal promise to arbitrate:

> The Supreme Court has repeatedly emphasized that "questions or arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Moses H. Cone*, 460 U.S. at 24, 103 S.Ct. at 941). The district court's analysis turned this clear injunction on its head, pursuing every possible avenue to avoid the binding arbitration agreement between O'Neil and her employer. We cannot endorse such an approach. Accordingly, we reverse.
>
> . . .

Id. at 276.

In sharp contrast to the Fourth Circuit approach in *Hill* and *O'Neil*, the West Virginia Supreme Court of Appeals looked beyond the four corners of Respondent's straight forward two-page agreement and instead found the contract to arbitrate lacking in consideration by examining the underlying Ryan's/EDSI contract. The Sixth and Seventh Circuits applied a similar arbitration-hostile approach by going well beyond the four corners of a virtually identical agreement in striking down Ryan's arbitration program. *Walker*, *supra*;

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000) (refusing to enforce the Ryan's arbitration agreement under state contract law principles by finding the agreement lacking in consideration because EDSI retained the discretion to modify its rules from time to time and, theoretically, could amend its rules to provide for a coin toss, foot race or some other capricious means of dispute resolution); *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2000) (same).

Depending solely upon geography, there is a demonstrable difference in this country in the way in which arbitration agreements are scrutinized and enforced. This is nothing short of arbitrary in that the FAA and the federal case law promulgated thereunder require uniformity in the treatment of contracts to arbitrate. This division should be resolved by this Honorable Court.

CONCLUSION

For the foregoing reasons, the instant petition should be granted.

Respectfully submitted,

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August 9, 2005

APPENDIX A

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32042

[Filed, May 11, 2005]

STATE OF WEST VIRGINIA EX REL. CHRYSTAL SAYLOR, Petitioner,	)
v.	)
HONORABLE CHRISTOPHER WILKES, JUDGE OF THE CIRCUIT COURT OF BERKELEY COUNTY; TED SMITH AND RYAN'S FAMILY STEAK HOUSES, INC., Respondents	)

OPINION

Albright, Chief Justice: Chrystal Saylor as the plaintiff below (hereinafter referred to as "Petitioner") seeks a writ of prohibition to stop enforcement of the January 5, 2004, order of the Circuit Court of Berkeley County staying proceedings in the employment discrimination and constructive discharge suit she had filed against defendants below, Ted Smith and

Ryan's Family Steak Houses, Inc. (hereinafter "Respondents" when referred to collectively), and compelling arbitration of the employment-related claims. We grant the requested relief based on our review of the law, including that offered by the parties in their briefs and during oral presentation, as well as that provided by brief of the amicus curiae.[1]

I. Factual and Procedural Background

Petitioner is a former employee of the Ryan's Family Steak Houses, Inc. (hereinafter "Ryan's" when only the company is referenced) restaurant in Martinsburg, West Virginia, where she worked as a waitress. Ted Smith was an assistant manager at the restaurant.

A prerequisite for consideration of any applicant for employment with Ryan's is the completion by the candidate of a "Job Applicant Agreement to Arbitration of Employment-Related Disputes" (hereinafter referred to as "Petitioner's Agreement") with Employment Dispute Services, Inc. (hereinafter referred to as "EDSI"). Following are the introductory paragraphs of Petitioner's Agreement:

> Your potential Employer ("signatory company" or "Company")[2] has entered into an agreement with Employment Dispute Services, Inc. (EDSI) to arbitrate and resolve any and all employment-related

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[1] We take this opportunity to recognize the insightful contributions of the West Virginia Employment Lawyers Association to this case as amicus curiae.

[2] The arbitration services of EDSI are utilized by several companies in the restaurant business; the reference to "'signatory company' or 'Company'" in the context of this case is to Ryan's.

disputes between the Company's employees (and job applicants) and the Company under EDSI's program. The following Agreement between you and EDSI is a "selection of forum" agreement by which you agree that employment-related issues between you and the Company shall be resolved through Arbitration. Any arbitration matter shall be heard and decided under the provisions and the authority of the Federal Arbitration Act, 9 U.S.C. sec. 1, as applicable.

The purpose of this agreement is to provide You and the Company a forum in which claims or disputes with the Company and any other signatories may be resolved by arbitration rather than litigation. This Agreement does not restrict you from filing a claim or charge with any state or federal agency, for example, Equal Employment Opportunity Commission, state unemployment agency, state workers' compensation commission, where applicable. Rather, the Agreement applies only to State or Federal court proceedings.

The remainder of the two-page Agreement is divided into two parts, one containing provisions regarding acceptance of the EDSI document and the other detailing the terms of the contract with EDSI. These sections, including internal emphasis by underscore, italics, boldface and capitalization, read as follows:

A. Acceptance of EDSI Agreement

Important aspects of Your acceptance of this Agreement are:

1. You retain all the substantive legal rights and remedies under state and federal law that you would

otherwise have as an employee/applicant of the Company, and neither you nor the Company will have any additional substantive legal rights or remedies;

2. **YOU WAIVE ANY RIGHT ARISING UNDER EITHER STATE OR FEDERAL LAW TO HAVE YOUR CLAIM RESOLVED BY A JURY. RATHER, ANY CLAIM YOU MAY FILE WILL BE FINALLY RESOLVED BY A PANEL OF THREE NEUTRAL ARBITRATORS.**

3. You retain the right to file a claim or charge with any state or federal agency that would otherwise handle your claim or charge;

4. Except as to claims or charges finally resolved within a state or federal agency, you and the Company agree to use EDSI to resolve legal claims concerning you that either party would otherwise bring in state or federal court;

5. An EDSI decision on any dispute shall be **FINAL AND BINDING** on all parties.

B. Agreement

1. In consideration of my execution of this Agreement and consent to the terms herein, EDSI agrees to provide an *unbiased* arbitration forum, impartial Rules and Procedures, and a fair hearing and decision based on my claim or dispute I (employee/job applicant) may file or defend. Further, I acknowledge that by agreeing to resolve any future employment-related claims through arbitration rather than litigation, EDSI agrees to provide through its arbitral

forum the additional benefits of a substantially quicker, less burdensome and less expensive procedure for resolution of my claims as compared to typical litigation in state or federal court.

2. In consideration of my receipt of the benefits set forth above in Paragraph 1, I understand and agree to the following:

A. Any employment-related dispute between the Company, me and/or other signatories which would otherwise be brought in state or federal court will be brought **ONLY** in the EDSI arbitration forum and under EDSI Rules and Procedures. (Other signatories to the same Agreement with EDSI may be, for example, supervisors, managers, and agents of the Company.) I consent to allow EDSI to amend the applicable Rules and Procedures from time to time, at its discretion, in order to insure its ability to meet its obligations set forth in Paragraph 1 of this section. However, should the EDSI Rules and Procedures be amended, I shall have the right to choose to have my employment-related dispute resolved under Rules and Procedures in effect on the date I sign this Agreement or the Rules and Procedures in effect on the date I file a claim with EDSI. I agree that except as to claims or charges finally resolved within a state or federal agency, any and all disputes I may have with the Company, or its officers, managers, or agents, or that the Company, its supervisors, managers or other agents may have with me which would otherwise be decided in court, shall be resolved only through arbitration in the EDSI forum and **NOT THROUGH LITIGATION IN STATE OR FEDERAL COURT.**

B. The decision of an EDSI arbitration panel is final and binding on all parties. There is no appeal by any party to either state or federal court except as provided under the provisions of the Federal Arbitration Act.

C. This agreement is with EDSI, not with the Company, and is not, nor is it intended to be, an employment contract or any part of an employment contract. This agreement does not affect or alter My "at will" employment relationship with the Company.

D. The Company and any other successor or assign, its signatory superiors, managers and other agents are "third party beneficiary" of My agreement with EDSI, and I am a "third party beneficiary" of others' agreements with EDSI. A "third party beneficiary" is someone who benefits legally from a contract between two other parties.

E. I understand that I must use the EDSI forum for any and all employment-related disputes and/or claims and/or related tort claims I may have against the Company and all other signatories to this Agreement which could otherwise be brought in court, even if the agreement has been terminated since the date the claim arose. I understand that a claim is deemed to arise on the date the conduct giving rise to the claim is alleged to have occurred. In South Carolina and Texas this Agreement shall apply to personal injury tort claims where the Company is a "non-subscriber" and is not a covered employer under the state's workers' compensation insurance program.

F. If any of the foregoing terms of the Agreement are determined to be in violation of any law, rule or regulation or are otherwise unenforceable, that determination shall not affect any other clauses of the Agreement. All other clauses shall remain in full force and effect. If any EDSI Rules or Procedure is determined by any court or competent jurisdiction to be invalid or unenforceable, EDSI shall be permitted a reasonable period of time to amend its Rules and Procedures in order to accomplish the arbitration purpose of this Agreement.

G. My Agreement shall continue for the period of my employment with the Company unless mutually terminated in writing by EDSI and Me. However, I acknowledge that if this Agreement is terminated, any claim that arose prior to the termination of the Agreement shall be covered by this Agreement and must be submitted to arbitration in the EDSI forum.

H. My Agreement supersedes any and all prior understandings and agreements between the parties, or with the Company, concerning the resolution of any and all claims or disputes between the Company, its supervisors, managers, and/or other agents, and me. It contains the entire understanding and agreement of the parties regarding these subjects. My agreement may not be altered or amended, except in writing signed by the President of EDSI and me.

I. The Agreement is effective immediately. I understand I have the right to consult with an attorney of my choice prior to executing this agreement.

J. I have read the Agreement carefully and have been given a copy of full EDSI Rules and Procedures. I knowingly and voluntarily agree to be bound by the terms and conditions of the Agreement and EDSI Rules and Procedures, as modified and/or amended from time to time, except that should the EDSI Rules and Procedures be modified or amended, I shall have the right to choose to have my employment-related dispute resolved under the Rules and Procedures that are in effect on the date I sign this Agreement or the Rules and Procedures in effect on the date I file a claim with EDSI.

Following thereafter are spaces to insert the date, information regarding the applicant/employee, signature lines for the applicant/employee and a witness, and information regarding parent or guardian approval if the applicant is under the age of eighteen. Petitioner's Agreement also contains the following requirement: "This Agreement must be notorized [sic] if not witnessed by an Agent of the Company." There following is the mailing address and phone number of EDSI. Petitioner signed the EDSI document on January 14, 2003, as part of the application process, was later hired by Ryan's as a server and ended her employment at Ryan's in July 2003.

Ryan's had a separate contract with EDSI (hereinafter referred to as "Ryan's Agreement"). Under Ryan's Agreement, Ryan's paid for EDSI to, among other things, provide an arbitral forum for Ryan's and its job applicants and employees, and to train Ryan's managers and supervisors in the alternative dispute resolution program administered by EDSI. EDSI also agreed to "assist the Company in the conduct of the Company's action to enforce its rights as a third party beneficiary." Ryan's Agreement was subject to cancellation by Ryan's upon ten days written notice.

On October 3, 2003, Petitioner filed a complaint in the lower court based on violation of the West Virginia Human Rights Act, claiming specifically that she was sexually harassed by an assistant manager at Ryan's which effectively resulted in constructive discharge from her employment with Ryan's. Through the complaint, Petitioner also sought a declaratory judgment on the validity of the mandatory, pre-employment arbitration agreement she had signed with EDSI, to which Ryan's ostensibly was a third-party beneficiary. Respondents reacted by petitioning the court below to compel arbitration and to stay further circuit court proceedings pursuant to the provisions of the Federal Arbitration Act (hereinafter referred to as "FAA").[3] Petitioner argued that the FAA did not govern because Petitioner's Agreement was not a valid and enforceable contract and was an ineffective means for vindicating her statutory rights. By order dated January 5, 2004, the lower court found the arbitration agreement enforceable and ordered that the employment dispute be resolved in an arbitral rather than judicial forum. Petitioner's reconsideration request was likewise denied by order dated July 20, 2004. Thereafter Petitioner sought relief in prohibition through this Court and we issued a rule to show cause order on October 21, 2004.

II. Standard of Review

We have acknowledged that a petition for a writ of prohibition is an appropriate method by which to obtain review by this Court of a circuit court's decision to compel arbitration. *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 555, 567 S.E.2d 265, 271 (2002). As it is an extraordinary remedy, "prohibition lies only to restrain inferior courts from

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[3] 9 U.S.C. §§ 1 to 16.

proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). We have further said that

> in determining whether to entertain and issue the writ of prohibition . . . not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). Additionally, our review of whether Petitioner's Agreement represents a valid and enforceable contract is de novo. *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 555-56, 567 S.E.2d 265, 271-72

(2002). With these principles as our guide, we proceed to examine the issues raised.

III. Discussion

Petitioner's general assertion is that the lower court's decision to compel arbitration pursuant to the provisions of the FAA is based on the erroneous finding that Petitioner's Agreement was a valid and enforceable contract. The FAA, initially enacted by Congress in 1925, promotes the enforcement of arbitration agreements involving interstate commerce, including employment-related arbitration agreements,[4] but only when such agreements constitute valid contracts under state law.[5] Section two of the FAA specifically provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising

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[4] The express statutory exception of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" was narrowly defined by the United States Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001), to exclude only those employment arbitration agreements of workers actually engaged in transportation of goods in commerce. 9 U.S.C. § 1 (1947).

[5] As the U. S. Supreme Court explained in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996), "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Id.* at 687.

> out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1947) (emphasis added). The scope of this section of the FAA was addressed in the following way by the United States Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), a case involving enforcement of an arbitration clause in a construction contract: "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 24. The high court went on to say in *Moses* that the enforcement provisions of the FAA applied equally to state and federal courts. *Id.* at 26 n. 34. The following year, the Supreme Court in *Southland Corporation v. Keating*, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984), found that the FAA preempted state arbitration law. The Court said in *Keating* that, other than the statutory requirements that the disputed contract involve commerce and be subject to the same bases for revocation as other contracts, there was "nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Id.* at 11. Several years later, the Supreme Court found no inherent problem with statutory claims such as a Human Rights Act claim being part of an arbitration agreement enforceable pursuant to the FAA. "'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by that statute; it only submits their resolution in an arbitral, rather than judicial, forum.'

Mitsubishi [Motors Corp. v. Soler Chrysler-Plymouth, Inc.], 473 U.S. [614 (1985)], at 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) (considering a case involving an age discrimination claim). Nevertheless, the Supreme Court in *Gilmer*, again quoting from its earlier decision in *Mitsubishi*, stressed:

> "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' *Mitsubishi*, 473 U.S., at 627."

500 U.S. at 33. Keeping with this proposition, this Court has found that arbitration clauses are subject to attack under state contract law principles. *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002) (case involving consumer protection law). We recently had occasion to examine whether state contract principles would defeat an arbitration agreement in an employment-related context in *State ex rel. Wells v. Matish*, 215 W.Va. 686, 600 S.E.2d 583 (2004). In *Wells*, we upheld the validity of an arbitration provision by finding, among other things, that the contract at issue was not a contract of adhesion and the employee as a sophisticated party had freely negotiated the terms of his employment agreement.

The particular state contract law principles upon which Petitioner in the instant case relies to support the claim that the arbitration document she signed was an unenforceable contract include: the document was an unconscionable contract of adhesion, it lacked consideration and the arbitral forum EDSI would provide pursuant to Petitioner's

Agreement would not afford an effective means to vindicate her rights under the Human Rights Act.

We begin our examination by observing generally that the document Petitioner signed was not with Ryan's but with EDSI. As summarily mentioned in Petitioner's Agreement, Ryan's had separately contracted with EDSI to provide arbitration services for all employment-related disputes between Ryan's and its employees. Apparently Ryan's Agreement with EDSI was executed some time before Petitioner applied for a job at Ryan's. Although Petitioner's Agreement purports to be with EDSI, no signature of an EDSI representative is required on Petitioner's Agreement and a signature line for someone from EDSI does not appear on the form. Petitioner's Agreement is an adhesion contract in that it is a "standardized contract form offered . . . on essentially [a] 'take it or leave it' basis. . . . [leaving the] weaker party. . . no realistic choice as to its terms." *Black's Law Dictionary* 40 (6th ed. West 1990). *See also Copley v. NCR Corp.*, 183 W.Va. 152, 156, 394 S.E.2d 751, 755 (1990) ("The form nature of the contract, containing no individualized terms relating to . . . [the plaintiff's] employment, bespeaks a contract of adhesion.")

We have recognized that it is likely that the bulk of the contracts signed in this country are contracts of adhesion and are generally enforceable. *See State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002). However, when the "gross inadequacy in bargaining power" combines with "terms unreasonably favorable to the stronger party," the contract provisions will be found unconscionable which in turn renders the contract unenforceable. *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 604, 346 S.E.2d 749, 753 (1986) (internal citations omitted). "A determination of unconscionability must focus on the relative positions of the

parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and []the existence of unfair terms in the contract.[]" Syl. Pt. 4, in part, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991). In the context of arbitration agreements,

> it is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

Syl. Pt. 3, *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977).

After analyzing these considerations in light of the facts in this case, we find Petitioner's Agreement an unconscionable adhesion contract which is unenforceable. The bargaining position between Petitioner and EDSI was grossly unequal. Petitioner, possessing only a tenth grade education, had little understanding of the law generally or arbitration specifically at the time she sought the low-paying job as a server or waitress with Ryan's, a multi-state restaurant chain. EDSI is a corporation which fashioned Petitioner's Agreement, under the direction of legal counsel, to meet its needs and the needs

of the companies, including Ryan's, which had contracted for the arbitration services of EDSI. Petitioner was not apprised of the terms of the relationship, contractual or otherwise, between EDSI and Ryan's and it is likely that Petitioner did not even realize that she was signing a document with any entity other than Ryan's since the arbitration document was presented to her by someone at Ryan's as part of an application packet. The terms of Petitioner's Agreement were not negotiable and clearly weighed in favor of EDSI and the companies with whom EDSI contracted to provide arbitration services. EDSI retained the right to unilaterally modify rules governing arbitration without input or notice to Petitioner before, during or after amendments are made. At the same time, Ryan's Agreement provided that EDSI would train Ryan's managers and supervisors regarding the dispute resolution program EDSI administered. Additionally, Petitioner's Agreement reflects gross disparity of the values exchanged between Petitioner and EDSI, as is evident in our later discussion of Petitioner's argument regarding lack of consideration.

The court below placed particular emphasis on the fact that EDSI used capital lettering and boldface print to highlight important sections of Petitioner's Agreement. While such efforts may prove to show intent to provide clear information, that alone cannot overcome the one-sidedness of the proposal. Underscoring a provision that a job applicant has the right to consult with an attorney prior to signing a contract is hardly putting an applicant of a low-paying job on equal footing with a corporation such as EDSI. Moreover, even if an applicant in Petitioner's position would be able to manage to afford an attorney, doing so would hardly leave a favorable impression with the company to which she is applying. The "right" afforded to seek legal advice is illusive at best.

These examples support our finding the arbitration agreement unenforceable as an unconscionable contract of adhesion in that they demonstrate a flagrant disparity in bargaining power, confirm a lack of meaningful alternatives available to Petitioner and establish the omission of critical terms and conditions in the arbitration document.

Petitioner also asserts that the EDSI document is unenforceable because it lacks consideration. As this Court stated in syllabus point one of *Tabler v. Hoult*, 110 W.Va. 542, 158 S.E. 782 (1931), in contract formation "[a] valuable consideration may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." In *Cook v. Heck's Inc.*, 176 W.Va. 368, 342 S.E.2d 453 (1986), we further recognized that

> consideration is . . . an essential element of a contract. Consideration has been defined as "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another. 17 Am.Jur.2d, Contracts, Section 85. A benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract. 17 Am.Jur.2d, Contracts, Section 96.

Id. at 373, 342 S.E.2d at 458-59 (some citations omitted).

Respondents argue that the lower court correctly concluded that Ryan's offer of employment to Petitioner supplied the necessary consideration to form a binding contract. Respondents support this argument by directing us to Restatement (Second) of Contracts § 71 (4) and asserting that the source of the consideration is largely irrelevant as

long as the consideration is bargained for in exchange for the promise.[6] Based upon our examination of not only Petitioner's Agreement but also of Ryan's Agreement we find the lower court's conclusion to be flawed.

Under Ryan's Agreement, EDSI was obligated to administer and provide access to an alternative dispute resolution process and Ryan's was only required to pay a fee for that service. EDSI's agreement with Ryan's did not actually require Ryan's to submit its employment claims to the EDSI arbitration forum. As observed in an opinion filed on March 9, 2005, by the U. S. Sixth Circuit Court of Appeals in a case in which the federal court was called upon to examine these provisions along with provisions from the employee arbitration agreement: "The Arbitration Agreements that Plaintiffs executed misrepresent the meaning of the EDSI/Ryan's agreement by stating that Ryan's 'has entered into an agreement with [EDSI] to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company.'" *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 380, 2005 WL 544353, 8 (6th Cir. 2005).

Since Ryan's had not promised to submit its employment-related claims to arbitration, the only possible basis to assert that Ryan's actions constituted adequate consideration was that Ryan's promised to review a candidate's application for employment if the applicant promised to arbitrate employment disputes. Federal courts applying the contract law of Indiana

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[6] Restatement (Second) of Contracts § 71 (4) states: "The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person."

and Tennessee to arbitration agreements involving EDSI and Ryan's have concluded that "merely a promise to consider an applicant's application, not employ her[,] . . . standing alone, will not bear the weight required to allow us to construe the Arbitration Agreement as a binding contract." *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 1001-02 (S.D. Ind. 2001) (applying Indiana contract law); *see also Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d at 381, 2005 WL 544353 at 8 ("Ryan's has failed to demonstrate that, under Tennessee law, an employer's promise to consider an employment application is adequate consideration for a promise to arbitrate employment disputes that are wholly unrelated to the application or hiring process."); *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 760 (7th Cir. 2001) ("The defendants provide no evidence that any Indiana court has ever held that a mere promise to consider an application for employment would provide consideration for a separate contract.").

It is well-established under contract law in West Virginia that no legal contract exists if the minds of the parties are not in agreement with the essential elements or contract "fundamentals . . . [which include] competent parties, legal subject matter, valuable consideration and mutual assent." Syl. Pt. 5, in part, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926). We would be hard-pressed to find that mutual agreement as to consideration was reached in this case when it is clear that Petitioner's Agreement expressly misrepresented that Ryan's was similarly bound under a separate agreement to submit all its employment disputes through the EDSI arbitration process. While the promise of a third-party beneficiary to a contract may serve as the requisite consideration to form a binding contract as Respondents contend, that conclusion is premised on such consideration being bargained for in exchange for the

return promise. It is self-evident that misrepresentation of relevant facts precludes a bargained-for exchange. The only possible third-party consideration represented by the terms of Petitioner's Agreement we note is found in Ryan's promise to review the application of job candidates in exchange for the applicant's waiver of valuable rights by signing the arbitration agreement. Generally any act done by a promisee at the request of a promisor is a sufficient consideration to form the basis of a binding contract when the promises are made with full knowledge of all of the circumstances. *See Lowther Oil. Co. v. Guffey*, 52 W.Va. 88, 91, 43 S.E. 101, 102 (1903) (Any amount of consideration forms a sufficient basis for an enforceable contract "unless fraud can be shown or the contract is so unfair and uneven as to render its enforcement equivalent to the perpetration of fraud."). Petitioner's lack of knowledge of the facts coupled with the gross imbalance of values exchanged lead us to conclude that Ryan's meager promise to review an employment application is insufficient consideration to support enforcement of an applicant's promise to submit all employment-related disputes, arising prior to as well as after being employed, to arbitration. Accordingly we hold that an employer's promise merely to review an employment application in exchange for a job applicant's promise to submit employment-related disputes not associated with the application process to arbitration does not represent consideration sufficient to create an enforceable contract to arbitrate such employment disputes. Thus, the Petitioner's Agreement is also unenforceable under state law principles due to lack of adequate consideration.

IV. Conclusion

Petitioner's Agreement with EDSI must fail under general contract law principles in this state as it is an unconscionable contract of adhesion and it lacks consideration. Accordingly,

we grant the requested writ of prohibition to bar enforcement of the January 5, 2004, order of the Circuit Court of Berkeley County through which proceedings in the employment-related suit Petitioner filed were stayed and arbitration of the disputed matters was ordered.[7]

Writ of prohibition granted.

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[7] Petitioner also raised various concerns about the arbitration Rules and Procedures developed by EDSI resulting in a biased and unfair alternative dispute resolution process. Because discovery ceased once the motion to compel arbitration was filed, we do not have before us pertinent information to make meaningful determinations regarding these concerns. Trial courts would be well-served when faced with motions to compel arbitration agreements to allow limited discovery to proceed so that the issues raised may be fully developed and addressed.

APPENDIX B

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

Civil Action No. 03-C-571

[Filed, January 5, 2005]

CHRYSTAL SAYLOR,
Plaintiff,

v.

TED SMITH and RYAN'S FAMILY STEAKHOUSES, INC.,
Defendants,

ORDER TO STAY

This matter came on this 5th day of January 2004 upon the Court's receipt of Defendants' Motion to Dismiss and Petition to Compel Arbitration and Stay Proceedings. This is an employment-related dispute wherein the Plaintiff, a former server at Defendant Ryan Family Steak Houses Inc.'s (hereinafter referred to as "Ryan's") Berkeley County, West Virginia restaurant, alleges that while employed at Ryan's she was subjected to unlawful sexual harassment by Defendant Ted Smith, a Ryan's assistant manager at the time of the Plaintiffs employment. The plaintiff argues the alleged

harassment violated the West Virginia Human Rights Act, W.VA. Code § 5-11-1, et seq. In addition, the plaintiff brought a declaratory judgment count seeking a Court Order that her arbitration agreement is neither valid nor enforceable.

Ryan's moved to compel arbitration of the dispute, pursuant to Section 4 of the Federal Arbitration Act (hereinafter the "FAA"). Ryan's further moved to have the suit dismissed for lack of subject matter jurisdiction and/or failure to state a claim. In the alternative, Ryan's requested the proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. In response, the plaintiff argues 1) the Agreement terminated when her employment was terminated; 2) the Agreement is invalid for lack of consideration; 3) the Agreement is invalid because it is an unconscionable contract of adhesion; and 4) the Agreement does not provide an effective means for vindicating her rights under the Human Rights Act because a) the arbitrator selection process is biased; b) the arbitration process contains inadequate discovery procedures; c) class action relief is unavailable and d) attorney's fees and costs are unavailable.

Upon consideration of the Defendant's Motions, Plaintiff's response, the Defendant's reply to Plaintiff's opposition to the Motions, the underlying record in this matter, and relevant case law, the Court has arrived at the following conclusions. For the reasons that follow, the arbitration agreement is enforceable and the Plaintiff must pursue her employment-related dispute with Ryan's in an arbitral, rather than judicial, forum.

FINDINGS OF FACT

1. Ryan's is a Delaware corporation which owns and operates a multi-state restaurant business, consisting of over

300 restaurants in over 23 states, including the Ryan's Steak House located in Martinsburg, Berkeley County, West Virginia. (Affidavit of Randy Hart, Ryan's Vice President--Human Resources at ¶ 4).

2. Ryan's is heavily involved in interstate commerce for the procurement of its food products, advertising, and other operating supplies and services. (Hart Aff. at ¶ 4).

3. Defendant Ryan's employed the plaintiff from on or about February 2003 to on or about July 26, 2003. (Complaint at ¶ 4).

4. As part of the application process and prior to beginning work as a Ryan's server, the Plaintiff voluntarily signed a "Job Application Agreement to Arbitration of Employment-Related Disputes" (hereinafter the "Agreement") with Employment Dispute Services, Inc. (hereinafter EDSI"). (Hart Aff. at ¶ 3).

5. The agreement to arbitrate is not a paragraph or clause within a larger employment contract, but rather is a two-page document which outlines the arbitration procedure.

6. The Agreement provides, among other pertinent provisions, the following arbitration clauses:

> B. 2. A. Any employment-related dispute between the Company, Me, and/or other signatories which would otherwise be brought in State or Federal court will be brought **ONLY** in the EDSI arbitration forum and under EDSI Rules and Procedures... I consent to allow EDSI to amend the applicable Rules and Procedures from time to time, at its discretion, in order to

insure its ability to meet its obligations set forth in Paragraph 1 of this section. However should the EDSI Rules and Procedures be amended, I shall have the right to choose to have my employment-related dispute resolved under Rules and Procedures in effect on the date I sign this Agreement or the Rules and Procedures in effect on the date I file a claim with EDSI. I agree that except as to claims or charges finally resolved within a state or federal agency, any and all disputes I may have with the Company, or its officers, managers, or agents, or that the Company, its supervisors, managers or other agents may have with me which would otherwise be decided in court, shall be resolved only through arbitration in the EDSI forum and **NOT THROUGH LITIGATION IN STATE OR FEDERAL COURT**.

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B. 2. E. I understand that I must use the EDSI forum for any and all employment-related disputes and/or claims and/or related tort claims I may have against the Company and all other signatories to this Agreement which could otherwise be brought in court, even if this Agreement has been terminated since the date the claim arose...

The arbitration agreement expressly provides that Ryan's is a third-party beneficiary of the contract. Agreement, § B.2.D. The EDSI agreement which Plaintiff signed clearly requires

her to submit any employment-related disputes with Ryan's to arbitration in the EDSI forum.

7. The arbitration agreement contains a clause guaranteeing the claimant retains all the substantive legal rights and remedies under state and federal law which the claimant would otherwise have. Agreement, § A.1.

8. Nowhere does the arbitration agreement prohibit the claimant from collecting punitive damages.

9. Upon review of the EDSI Arbitration Rules and Procedures, this Court finds them to be fair and unbiased. Specifically, Article I of the Rules & Procedures allows for the same substantive rights and remedies which would be available to the claimant in federal or state court. Article VI permits claimants to be represented by the counsel of their choice. The Defendant must respond to the claim in writing. EDSI Rules, Article VIII. Three adjudicators make up the arbitration committee. Any potential Adjudicators for the panel of three may be struck for cause. EDSI Rules, Article IX. Prior to the adjudication, the parties will exchange evidence and reveal witnesses, along with a summary of expected testimony. EDSI Rules, Article X. Article XII provides that each party may serve a request for a production of documents.

Furthermore, each party may conduct one deposition and may request additional depositions if necessary. *Id.* A tape recording is made of the adjudication proceedings and party may transcribe the same at their own expense. EDSI Rules, Article XIII. Finally, Article XVII of the Rules provides that should the Rules and Procedures be modified by EDSI after a claimant has signed the Agreement, then the claimant has the choice to have his or her claim adjudicated under the

Rules and Procedures in effect at the time the Agreement was signed or under the Rules and Procedures in effect on the date the claim is filed with EDSI.

10. This Court also finds the EDSI Adjudication Panel to be organized in a fair manner as well. Article IX governs the selection of the adjudicators. Each of the three adjudicators shall be chosen from each of the following selection pools: a) supervisors or managers of an employer signatory to EDSI Agreements; b) non-exempt employees who are signatory to EDSI Agreements; and c) attorneys, retired judges, or other competent legal professional persons not affiliated with either party. As stated above, any potential adjudicator can be struck for cause. Finally, no individual shall be included in the selection pool who has at any time been employed by the employer involved in the dispute at hand. That is, using the case at hand as an example, no person who at any time was a Ryan's employee would be able to sit as an adjudicator in the dispute at hand.

11. The Agreement state's that it shall "continue for the period of [the plaintiff's] employment with the Company unless mutually terminated in writing by EDSI and [the plaintiff]. However, I acknowledge that if this Agreement is terminated, any claim that arose prior to the termination the Agreement shall be covered by this Agreement and must be submitted to arbitration in EDSI forum." Agreement, § B.2.G.

CONCLUSIONS OF LAW

1. The Federal Arbitration Act (hereinafter "FAA") provides that written agreements to arbitrate controversies arising out of an agreement "evidencing a transaction involving commerce.., shall be valid, irrevocable, and

enforceable, save upon such grounds as exist in law or equity for the revocation of any contract." *See* 9 U.S.C. § 2; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

2. Underlying this favorable policy towards arbitration agreements is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation. *Hightower v. GMRI, Inc.*, 272 F.3d 239, 241 (4th Cir. 2001).

3. "By its terms, the FAA leaves no place for the exercise of discretion by a [trial] court, but instead mandates that [trial] courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.*, 470 U.S. at 218.

4. In the Fourth Circuit, a litigant can compel arbitration under the FAA if he can demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991).

5. Ryan's operation of Over 300 restaurants in 23 states and its heavy involvement in interstate commerce for the procurement of its food products, advertising and other operating supplies and services lead this Court to conclude that the necessary standard for the FAA's interstate commerce requirement is met. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995) (establishing the standard that the nexus with interstate commerce is met if the transactions remotely involve interstate commerce even if the

parties do not contemplate an interstate commerce connection.)

6. Indeed, in *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999), the Supreme Court held that an individual cannot be required to arbitrate a cause of action arising under West Virginia Code § 5-11-13(b). The Supreme Court's decision in Wheeling-Pittsburgh Steel rested upon the Court's prior decision in *Copley v. NCR Corp.*, 183 W.VA. 152, 394 S.E.2d 751 (1990). However, a federal court sitting in West Virginia recently questioned whether the West Virginia Supreme Court would rule the same way today, given the 1991 United States Supreme Court ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, (1991) that an employee's age discrimination claim under the Age Discrimination in Employment Act (ADEA) was subject to a compulsory arbitration agreement contained in his securities registration application. In addition, the Fourth Circuit recently recognized that "[w]hatever force *Copley* formerly had, its ruling on arbitration cannot trump *Chimer* and Circuit *City v. Adams*, 532 U.S. 105 (2001). The Supremacy Clause precludes any argument to the contrary." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002). Thus, this Court determines the FAA still governs.

7. This Court concludes, contrary to the Plaintiff's argument, that the arbitration agreement did *not* expire when the plaintiff's employment ended. The Plaintiff's argues the Agreement continued only while she was employed by Ryan's. Even if the Agreement did terminate at the end of Plaintiff' employment, her claim is still governed by the Agreement, as outlined in the plain language of Section B.2.G. of the Agreement, stating "any claim that arose prior to the termination of the Agreement shall be covered by this

Agreement and must be submitted to arbitration in the EDSI forum."

8. This Court finds that in consideration of the Plaintiff signing the Agreement, Ryan's offered her a job. Pursuant to the Restatement (Second) of Contracts § 71 (4), the consideration need not be offered by EDSI, but instead may be offered by another. (stating "[t]he performance or return promise may be given to the promisor or to some other person. It may be given by the promise or by some other person.")

9. Although previous courts[1] found the EDSI Agreement lacked consideration because EDSI could amend the Rules and Procedures at any time, this Court does not, as in mid-2000 EDSI amended its Rules providing the claimant a choice between the roles in effect at the time the Agreement was signed or the rules in effect at the time the demand for arbitration was filed.

10. The West Virginia courts recognize that "it is not the province of the judiciary to try to eliminate the inequities inevitable in a capitalist society." *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 346 S.E.2d 749, 753 (1986).

11. Unconscionability in West Virginia requires both "gross inadequacy in bargaining power" and "terms

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[1] *Floss v. Ryan's Family Steak Houses*, 211 F.3d 306 (6th Cir. 2000); *Walker v. Ryan's Fatally Steak Homes, Inc.*,__ F.3d___, 2003 WL 22533457 (M.D. Tenn Oct. 2, 2003); *Penn v. Ryan's Family Steak Houses, Inc.*,95 F. Supp 2d 940 (N.D. Ind. 2000), *aff'd on other grounds*, 269 F.3d 753; *Geiger v. Ryan's Family Steak Houses Inc.*, 134 F. Supp. 2d 985 (S.D. Ind. 2001).

unreasonably favorable to the stronger party." *Troy Mining v. Itmann Coal Co.*, 175 W. Va. at 504, 345 S.E.2d at 753.

12. The West Virginia Supreme Court recognizes that exculpatory provisions in a contract adhesion which would prohibit or greatly limit a person's enforcing or vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are granted by or arise under state law... are unconscionable. *State ex tel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 255, 273.

13. Given the plain language of the Agreement, the fact that the Agreement is a separate document as opposed to an exculpatory clause buried in a larger employment contract, the capital lettering and boldface print of important sections of the document, this Court cannot find the Agreement to be an unconscionable contract of adhesion. In addition, the Agreement preserves all of the Plaintiff's substantive legal fights, both State and Federal.

14. Having reviewed the Rules and Procedures governing the EDSI Arbitration process, this Court cannot agree with Plaintiffs arguments that the arbitrator selection process is biased. The United States Supreme Court has rejected any argument relying simply on speculation that an arbitration panel will be biased. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Although several courts have found potential bias in the EDSI forum[2], the underlying record in this case fails to

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[2] *Penn v. Ryan's Family Steak Houses, Inc.*, 95 F. Supp. 2d 940 (N.D. Ind. 2000), 269 F.3d 753 and *Geiger v. Ryan's Family Steak*

supply sufficient facts establishing bias or the appearance of bias on behalf of the arbitrators. Furthermore, there are no direct ties between the arbitrators and either the Plaintiff or Ryan's. Moreover, the EDSI system's numerous procedural safeguards, as enumerated in Paragraphs 9 and 10 in the Findings of Fact section above, further ensure a fair and unbiased forum.

15. Neither can this Court find that the discovery process provided under the EDSI system is inadequate. Both the claimant and Ryan's are provided the same process, which allows for both parties to request documents from the other; the deposition of one individual; and the power of the subpoena process as provided by law. Furthermore, both parties must reveal the documents to be entered into evidence as well as the expected testimony of any witnesses to be called.

16. Although the Agreement does prohibit class action relief, the failure to provide for a class action relief does not render an arbitration agreement void. *Adkins*, 303 F.3d at 503 (4th Cir. 2002). Indeed, the West Virginia Supreme Court in *State ex rel. Dunlap v. Berger*, *supra*, found a contract barring class action relief to be unconscionable. However, the agreement in that case also barred punitive damages as a remedy and the court seemed most concerned with the fact without either class action or punitive damages, the wrongdoers would go "unpunished, undeterred, and unaccountable." *Id.* at 278. Such is not the case with the Agreement at hand, for it does not bar punitive damages, and in the words of the Court, punitive damages "may be a powerful tool..." to punish the wrongdoer and to deter the

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Houses, Inc., 134 F. Supp. 2d 985 (S.D. Ind. 2001).

commission of similar offenses in the future." *Id.*, citing *Burgess v. Porterfield*, 196 W. Va. 178, 182, 469 S.E.2d 114-118 (1996). Therefore, because the Agreement at hand still provides for the award of punitive damage, the Court's fears of any wrongdoers going unpunished are allayed.

17. Finally, at no place in the Agreement is the Plaintiff barred from recovering attorney's fees and court costs and for this reason Plaintiff's argument that the Agreement fails to uphold her rights under the Human Rights Act must fail.

It is hereby **ORDERED** and **ADJUDGED** that

1) Defendant's Motion to Dismiss is hereby **DENIED**;

2) Defendant's Motion to Compel Arbitration is **GRANTED**; and

3) Defendant's Motion to Stay further proceedings in this matter pending arbitration of the dispute is **GRANTED**.

The Court notes the exception of counsel to any adverse ruling herein.

The Clerk shall forward attested copies of this order to all counsel as follows:

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/s/ Christopher C. Wilkes, Judge
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

MOTION FILED
SEP 1 2 2005

(1)

No. 05-205

In the Supreme Court of the United States

TED SMITH AND RYAN'S RESTAURANT GROUP INC., F/K/A RYAN'S FAMILY STEAK HOUSES, INC.,
Petitioners,

v.

STATE OF WEST VIRGINIA EX REL. CHRYSTAL SAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION AND BRIEF OF *AMICUS CURIAE* EMPLOYMENT DISPUTE SERVICES, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Employment Dispute Services, Inc. ("EDSI") respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in the above captioned case. Pursuant to Supreme Court Rule 37(2)(b), counsel for *amicus* wrote to counsel for all parties in this action requesting written consent to file this brief. Petitioners consented to EDSI's participation in this matter. A letter attesting to its consent has been submitted to this Court. Counsel for Respondent declined to consent for *amicus* to file this brief, necessitating the filing of this motion. *Amicus* submits that this case raises critical issues regarding the nationwide enforcement of employment-related mandatory arbitration systems of such importance that Respondent's decision to withhold consent should not foreclose participation by interested *amicus curiae*.

Founded in 1993, EDSI is in the exclusive business of offering and administering a third-party arbitration system. EDSI provides its services to employers and many thousands of employees across the United States. The exclusive mission of EDSI is to provide an efficient, fair and economical forum in which employers and employees can obtain final resolution of the vast majority of employment-related disputes. Arbitration, as opposed to litigation, of employment-related claims has repeatedly been recognized by this and other courts as consistent with the federal policy favoring arbitration.

Thus, EDSI has a relevant interest in the development of clear, rational and consistent national standards for the enforcement of arbitration contracts in the employment context and recognizes its obligation to assist the courts in cases involving questions of major significance. EDSI previously contributed an *amicus* brief in support of the

petitioner in the case of *Ryan's Family Steak Houses, Inc. v. Erric Walker*, Docket No. 04-1672, in which a petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit remains pending.

Because resolution of the issues presented by this case will have a direct bearing on the enforcement of all mandatory employment-related arbitration systems, as well as the many thousands of EDSI arbitration contracts in effect across the United States, EDSI respectfully requests the opportunity to advise this Court more fully of the urgency of review in this matter.

Respectfully submitted,

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INTEREST OF EMPLOYMENT DISPUTE SERVICES, INC.

Employment Dispute Services, Inc. (hereafter "EDSI") is in the exclusive business of providing a fair and impartial arbitration forum for the resolution of employment-related disputes. Petitioner Ryan's Restaurant Group, Inc. f/k/a Family Steak Houses, Inc. (hereafter "Ryan's") is one of a number of employers that attempts to resolve employment-related disputes with employees by submission of the disputes for adjudication under the EDSI arbitration system. The efficacy of the EDSI arbitration system and the governing rules were central to the Supreme Court of Appeals of West Virginia's decision in this matter. EDSI's interest herein is to support reversal of the Supreme Court of Appeals of West Virginia's erroneous decision in order to protect arbitration systems generally and to confirm the legitimacy of its arbitration system which has been recognized by numerous state and federal trial and appellate courts.[1]

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Ryan's has submitted a petition for a writ of certiorari seeking review of the judgment of the Supreme Court of Appeals of West Virginia. EDSI submits this brief in support of Ryan's petition for a writ of certiorari.

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[1] Pursuant to Supreme Court Rule 37, EDSI hereby certifies that no counsel for any party herein authored any portion of this brief and no entity other than EDSI made any financial contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Supreme Court of Appeals of West Virginia improperly created dual standards under which to analyze employment-related arbitration contracts. One standard applies when the court deems that an individual exceeds an undefined level of education and sophistication and the other standard applies when the court prefers to find someone falls below this amorphous line. The creation of these dual standards serves to differentiate arbitration contracts from other forms of contracts and is inconsistent with the federal policy favoring arbitration, the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, and this Court's cases applying its terms.

The Supreme Court of Appeals of West Virginia patently misapplied established West Virginia contract law principles to justify its decision to bar enforcement of the EDSI arbitration contract and attempted to support its anti-arbitration decision in this matter on a foundation of factual findings and conclusions that were unsupported by the court's analysis or the record. State appellate courts should not be allowed to cloak decisions hostile to arbitration in a perversion of state law in order to shield those decisions from further review.

ARGUMENT

I. The Supreme Court of Appeals of West Virginia Improperly Created a Dual Standard Under Which The Enforceability Of An Arbitration Contract Hinges On The Education and Sophistication Of The Individual Executing The Contract.

This Court has consistently warned that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (hereafter "FAA") bars courts from applying special or more stringent standards to the enforcement of arbitration contracts as compared to contracts generally. Rather, arbitration contracts must be enforced on the same basis as any other contract. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)("The FAA's purpose was to reverse the longstanding hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration contracts upon the same footing as other contracts.").

The Supreme Court of Appeals of West Virginia ignored this overarching principle when it applied a heightened level of scrutiny to the arbitration contract at issue in this matter that involves, according to the lower court, a female with "only a tenth grade education, [who] had little understanding of the law generally or arbitration specifically." *State of West Virginia Ex Rel. Chrystal Saylor v. Honorable Christopher Wilkes, Judge of the Circuit Court of Berkley County, Ted Smith and Ryan's Family Steak Houses, Inc.*, 613 S.E. 2d 914, 922 (W.Va. 2005). The paternalistic scrutiny demonstrated in this case was far more demanding than that applied by the same court in *State of West Virginia Ex Rel. Erik P. Wells v. The Honorable James A. Matish, Judge of the Circuit Court of Harrison County, and WBOY-TV, a W.V.*

LLC, 600 S.E. 2d 583 (W.Va. 2004). In the *Wells* matter the court was clearly influenced by its determination that Wells was a sophisticated party and held Wells to the arbitration agreement he had signed. *See* 600 S.E. 2d at 589.

When called upon to enforce arbitration agreements, this Court's cases applying the FAA do not permit lower courts to select the standards they prefer depending upon their particular sympathies for the contracting parties. Rather, the FAA outlines a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA's underlying purpose is to insure the consistent enforcement of private arbitration contracts. *See, e.g. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). The lower court's patent desire to relieve an individual with "only a tenth grade education" from the terms of her arbitration contract is contrary to this Court's directive in *Byrd* that arbitration contracts are to be placed on the same footing as any other contract.

It has long been West Virginia law that a party who signs a contract is presumed to know its contents and is bound even if the party choses not to read the contract before signing:

> One is never required to, and never should, execute any written instrument without first becoming fully acquainted with its contents. He should read it, if able; or if illiterate, have it read to him. And when he has signed a written contract, the law *prima facie*

> presumes that he discharged this duty; therefore, whether in fact he did it, or chose to waive the privilege, his signature binds him.

Whittaker v. South West Virginia Imp. Co., 12 S.E. 507, 511 (W.Va. 1890).

The generally applicable West Virginia contract law principles govern the enforceability of Ms. Saylor's arbitration contract with EDSI. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995)(when enforcing arbitration contracts courts must apply ordinary state-law principles that govern the formation of contracts). The lower court's obvious intention to relieve Ms. Saylor of her commitments under the EDSI arbitration contract based on its sympathy for her lack of education and sophistication cannot be reconciled with the West Virginia contract law requirement that a contract is binding even upon an illiterate individual who chooses not to have the contract read to him and therefore may have no knowledge of the express terms of the contract. The Supreme Court of Appeals of West Virginia's application of different enforceability standards to arbitration contracts depending on the education and sophistication of the employee agreeing to arbitrate cannot be reconciled with the West Virginia contract law principle that an unread but voluntarily signed contract must be enforced.

The imposition of differing standards of the sort envisioned by the Supreme Court of Appeals of West Virginia would potentially render unenforceable every arbitration system used across a large group of individuals. Employers such as Ryan's, Circuit City and hundreds of others insist on execution of arbitration agreements by many thousands of applicants. Though the EDSI arbitration agreement and rules are written in easily understood language, it would be

impossible for an employer to individually evaluate whether a specific signor possesses sufficient education and sophistication to satisfy the amorphous standards applied by the Supreme Court of Appeals of West Virginia. The long standing federal policy favoring arbitration should not be subject to such fluid and subjective standards that will differ from judge to judge and state to state.

II. The Supreme Court of Appeals of West Virginia Misapplied West Virginia Contract Law to Excuse Its Refusal to Enforce The Arbitration Contract And To Mask its Hostility To Arbitration.

One of the justifications articulated by the Supreme Court of Appeals of West Virginia for its refusal to enforce Ms. Saylor's arbitration contract was that there was "a gross imbalance of values exchanged" between Ryan's and Ms. Saylor and thus there was insufficient consideration to bind Ms. Saylor to her contract. *Saylor*, 613 S.E. 2d at 924. However, the lower court's analysis of the quantum of consideration is completely contrary to the West Virginia contract law the court cited in support of its position. Rather than allowing a balancing of the perceived value of the consideration exchanged, West Virginia law holds that any amount of consideration forms a sufficient basis for an enforceable contract in the absence of fraud. *See, e.g., Lowther Oil Co. v. Guffey*, 43 S.E. 101, 102 (W. Va. 1903)(Any amount of consideration forms a sufficient basis for an enforceable contract "unless fraud can be shown or the contract is so unfair and uneven as to render its enforcement equivalent to the perpetration of fraud.").

Aside from its misapplication of West Virginia law to find that Ryan's provided inadequate consideration, the Supreme Court of Appeals of West Virginia's intention to go to any